STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of BONNIE M. LAVERTY, Deceased.

WILLARD L. MIKESELL,

Petitioner-Appellant/Cross-Appellee,

v

WILLIAM L. FERRIGAN, Successor Personal Representative of the Estate of BONNIE M. LAVERTY, Deceased,

Respondent-Appellee/Cross-Appellant,

and

LORENA F. HAMMOND, LINDA M. DAVIS and SHARON J. MILLER,

Appellees/Cross-Appellants.

UNPUBLISHED
June 18, 1999

No. 207040
Eaton Probate Court
LC No. 95-032383 SE

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Petitioner Willard L. Mikesell, who is the former personal representative and attorney for the Estate of Bonnie M. Laverty, deceased, appeals as of right from a probate court order surcharging and sanctioning him in the amount of $44,092.71, but allowing him to offset against that amount $30,114.75 in attorney fees, leaving $13,977.96 owing to the estate. Respondent William L. Ferrigan, who is the successor personal representative of the estate, and appellees Lorena Hammond, Linda Davis, and Sharon Miller, who are all heirs at law to Bonnie Laverty, cross-appeal, challenging the probate court's decision to award petitioner the full amount of his requested attorney fees. We affirm in part, reverse in part, and remand.

Petitioner raises numerous issues on appeal. Petitioner first challenges the probate court's June 24, 1996, order removing him as personal representative of the estate and appointing William Ferrigan as successor personal representative. However, this issue is not properly before this Court. Petitioner never appealed the June 24, 1996, order despite the fact that a direct appeal of right was available from that order. See MCR 5.801(B)(3)(a) (an order appointing or removing a personal representative is appealable by right), and MCR 7.203(A)(2) (this Court has jurisdiction of an appeal of right from an order from which an appeal of right has been established by law or court rule). Having failed to file a direct appeal from the probate court's June 24, 1996, order, petitioner may not now collaterally attack the probate court's decision removing him as personal representative and appointing William Ferrigan as successor personal representative.

Petitioner next claims that Ferrigan, as the successor personal representative, exceeded the authority conferred upon him pursuant to the court's June 24, 1996, order. This issue is without merit. First, as discussed above, petitioner did not directly appeal the June 24, 1996, order, and may not now collaterally attack the probate court's decision appointing Ferrigan as successor personal representative, or the conditions imposed on Ferrigan pursuant to that appointment. Second, after his removal as personal representative, petitioner was no longer a personal representative or a fiduciary representing an interested person under MCL 700.7; MSA 27.5007. Apart from advancing his own claim for attorney fees, which the probate court permitted petitioner to do, petitioner did not have standing to contest Ferrigan's performance or accounts as fiduciary. See MCR 5.205(C)(6); *In re Makarewicz*, 204 Mich App 369; 516 NW2d 90 (1994).

Petitioner next argues that the probate court erred by not resolving all issues pertaining to his account as fiduciary before entertaining any issues regarding Ferrigan's account. We conclude that petitioner has waived this issue by failing to cite any applicable authority in support of his claim. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Petitioner next argues that the probate court erred in finding that he violated his fiduciary duty by failing to file federal and state estate tax returns. We disagree. When a probate court sits without a jury, its findings of fact may not be reversed unless they are clearly erroneous. *In re Green Charitable Trust*, 172 Mich App 298, 311; 431 NW2d 492 (1988). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

The personal representative has a duty under the Revised Probate Code to file all applicable tax returns before being discharged. MCL 700.563(2); MSA 27.5563(2); *In re Rice Estate*, 138 Mich App 261, 269; 360 NW2d 587 (1984). In this case, the probate court made the following pertinent findings of fact:

> r. Mr. Mikesell failed to make proper investigation into the valuation of the estate assets and, as a consequence, failed to file the federal and state estate tax returns, subjecting the estate to penalties and interest.

s. Mr. Mikesell claimed that he relied upon two times the state-equalized value ("SEV"), less any stated consideration, in valuing the real property for estate tax purposes. Mr. Mikesell attempted to justify these calculations by stating that Eaton County requires fair market value for assessment purposes.

t. However, a fiduciary must be able to document and justify the valuation of property. Testimony from Mr. Ferrigan indicates that Mr. Mikesell's file contained no documentation in support of the valuations he claimed to rely upon.

u. Further, after being confronted with federal estate tax regulations which specifically prohibit reliance on tax assessment figures for estate tax valuation purposes, Mr. Mikesell changed his position and claimed he relied on other bases to determine valuation of real property for estate tax purposes.

v. The only time Mr. Mikesell deviated from his use of two times the SEV was in the case of income-producing property, such as the "post office property." For the post office property, Mr. Mikesell relied upon a value determined by the income approach, which yielded an appraisal of approximately $30,000 more than two times the SEV. This significant difference between the appraised value and two times the SEV for the post office property put Mr. Mikesell on notice that two times the SEV was a flawed method of determining real property value for federal estate tax purposes.

w. For estate tax purposes, Mr. Mikesell had a duty to adequately investigate any jointly held assets, including the source of any stated consideration. Mr. Mikesell failed to conduct such investigation.

x. Mr. Mikesell had a duty to establish the taxable value of the assets of the estate using IRS accepted methods, and he failed to do so.

y. The failure to file the federal and state estate tax returns was inexcusable

Contrary to petitioner's argument, Ferrigan did not act improperly or unreasonably when he proceeded to obtain appraisals of certain parcels of real estate, which ultimately led to valuations that subjected the estate to state and federal estate taxes. The record indicates that petitioner valued the properties using the estimated equalization method (i.e., doubling the SEV value), which did not reflect the fair market values of the properties. Evidence was presented that federal estate tax regulations prohibit the use of tax assessment figures (i.e., twice the SEV) in determining the value of real property for federal estate tax valuation purposes. IRC, Regs. 20.2031-1(b). Also, Michigan follows the IRS determination of value for estate tax purposes under state law. See MCL 205.255; MSA 7.591(25). Accordingly, the probate court did not clearly err in finding that petitioner failed to properly value the properties for estate tax purposes and, correspondingly, failed to file state and federal estate tax returns.

Petitioner next argues that the probate court erred in allowing attorney John Bos to testify as an expert witness under MRE 702. We disagree. We review the trial court's decision to admit evidence

for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Given Bos' knowledge and experience in estate planning and estate administration, the probate court did not abuse its discretion in determining that Bos was qualified to testify as an expert on the issue of estate administration and attorney fees. Petitioner's objections to Bos' qualifications affected the weight of his testimony, not its admissibility. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 406; 443 NW2d 340 (1989); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995).

Petitioner also contends that the probate court erred by not applying the same standards when evaluating his accountings that were applied when evaluating Ferrigan's accountings as successor personal representative. However, petitioner does not have standing to the extent his arguments concern Ferrigan's performance as the successor personal representative. Moreover, there is no merit to petitioner's claim in view of the probate court's determination that petitioner breached his fiduciary duties to the estate by failing to comply with rules, regulations, statutes and court rules applicable to estate proceedings.

Next, petitioner argues that he was properly entitled to hire Lorena Hammond as his agent to handle certain estate matters. While we do not disagree with this premise, the probate court found that Hammond was never retained as an agent under MCL 700.334(u); MSA 27.5334(u). The court stated:

> i. Lorena Hammond was not the employee or agent of Mr. Mikesell, and the fact that Lorena Hammond continued to collect estate funds, pay estate obligations from accounts that had been held jointly by herself and her mother does not relieve Mr. Mikesell of his fiduciary duty to marshall [sic] the estate assets and place them in an account in the estate's name under the control of the fiduciary.

Our review of the record reveals that these findings are not clearly erroneous.

Petitioner argues that the probate court erred in determining that he breached other fiduciary duties to the estate. We disagree. A fiduciary is liable for losses caused by negligence in the handling of an estate, and for any misfeasance, malfeasance, nonfeasance, or other breach of fiduciary duty. MCL 700.544; MSA 27.5544. The circumstances of each case must be examined to determine whether a fiduciary has been guilty of negligence or violation of his duties. *In re Norris Estate*, 151 Mich App 502, 512; 391 NW2d 391 (1986). Here, respondent's expert witness, John Bos, identified several aspects in which petitioner breached his fiduciary duties to the estate:

> The six month delay from the time of appointment . . . until he actually undertook his duties and responsibilities; failure to file the inventory timely; failure to include all of the assets of the decedent's estate on the inventory; failure to file the 1994 decedent's final 1040 income tax return; failure to properly inventory and value the assets; failure to file the estate income tax 1041 for the year ended December 31st,

> 1995, on a timely basis, failure to appraise the real property in the estate that wasn't to be sold to determine it's [sic] date of . . . fair market value for income tax purposes for the beneficiaries and for the inclusion on the inventory of those assets that were inventoried in the estate and to determine values for purposes of a potential federal estate tax return; failure to timely file the federal estate tax return and pay the tax; failure to investigate prior transfers to determine their impact on potential federal estate tax return; failure to file – timely file and prepare proper accountings as the personal representative; failure to keep separate time records of his time while serving as personal representative as versus his time served as attorney for the personal representative; failure to provide those attorney fee records to interested parties on a timely basis upon their request[.]

Thus, the probate court did not clearly err in finding that petitioner breached his fiduciary duties to the estate by, *inter alia*, failing to comply with applicable rules, regulations, statutes and court rules governing the administration of an estate.

Next, petitioner asserts that the probate court erred in deciding to surcharge and sanction petitioner in the amount of $44,092.71 The amount to be assessed as a surcharge is within the discretion of the probate court whose decision will not be reversed on appeal absent an abuse of discretion. *In re Thacker Estate,* 137 Mich App 253, 264; 358 NW2d 342 (1984).

The probate court properly assessed $11,008.00 in surcharges for Michigan estate tax penalties and interest and $4,731.24 for federal estate tax penalties and interest because of petitioner's failure to file the state and federal estate tax returns, due primarily to the undervaluation of estate assets. The probate court also properly awarded $380.59 in surcharges for federal income tax penalties and interest resulting from petitioner's failure to file a 1995 estate income tax return. Next, the probate court properly awarded $186.08 in surcharges relating to federal income tax penalties and interest because petitioner failed to file the decedent's 1994 individual return. Furthermore, the probate court did not err in awarding $7,080 and $206.80, in surcharges for Ferrigan's fees and costs, respectively, attributable to petitioner's numerous breaches that caused the estate to incur the additional fees and costs. Finally, the probate court did not abuse its discretion in awarding $3,000.00 in surcharges for expert witness fees and $17,500.00 in surcharges for the attorney fees of the interested parties. Although appellees argue, on cross-appeal, that the probate court erred by failing to surcharge petitioner for the full amount of their requested attorney and expert witness fees, we are not persuaded that the amount awarded constitutes an abuse of discretion. *In re Thacker Estate, supra*.

However, we agree with appellees' claim, on cross-appeal, that the probate court abused its discretion in awarding petitioner the full amount of his requested attorney fees, that being $30,114.75.

Under MCL 700.543; MSA 27.5543, an attorney employed by the fiduciary of an estate "to perform necessary legal services in behalf of the estate" is entitled to "reasonable compensation for the legal services." Legal services rendered in behalf of an estate are compensable when the services confer a benefit upon the estate by either increasing or preserving the estate's assets. *In re Sloan Estate,* 212 Mich App 357, 362; 538 NW2d 47 (1995). Unless attorney fees are consented to by all

the parties, the attorney seeking compensation must provide the court with a written description of the services provided. MCR 8.303; *In re Kreuger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989); *In re Kiebler Estate*, 131 Mich App 441, 442-443; 345 NW2d 713 (1984).

A fiduciary is also entitled to "reasonable expenses incurred in the administration of the estate" as the court deems "just and reasonable" under MCL 700.541; MSA 27.5541. However, an attorney acting as a fiduciary is not entitled to charge attorney rates for fiduciary services. *Wisner v Mabley Estate*, 70 Mich 271, 285; 38 NW 262 (1888).

The award or denial of payment of attorney fees is within the probate court's discretion, "and only when there is a manifest abuse of that discretion will such a decision be overruled on appeal." *In re Estate of Weaver*, 119 Mich App 796, 799; 327 NW2d 366 (1982). When considering the reasonableness of fees, appropriate factors to consider include the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience required in performing the work, and the results obtained. *In re Krueger Estate, supra* at 248. The burden of proof is on the attorney fee applicant to demonstrate the reasonableness of the fees requested for services rendered on behalf of an estate. *Id.*

In this case, the probate court made the following findings of fact with regard to petitioner's request for attorney fees:

> a. Prior to the commencement of the trial on Mr. Mikesell's petition for payment of attorney fees, Mr. Mikesell took the position that he did not have to do an itemization of fiduciary fees and attorney fees; and the court corrected this misconception on the record at a previous hearing.
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> f. Mr. Mikesell testified that he did not bill any time as fiduciary of the estate, and that all time reflected in his billing statement constituted attorney services. The court rejects Mr. Mikesell's reasoning. Many of Mr. Mikesell's activities could have been performed by a layman and did not require an attorney's expertise.
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> g. $150 per hour is a reasonable rate for attorney fees, but not for fiduciary fees. Clearly, some of the work reflected in Mr. Mikesell's billing is not attorney work and does not justify a $150 per hour charge.
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> h. Because Mr. Mikesell has provided narrative descriptions of services which encompass both legal and fiduciary activities, it is impossible for the court, as it was also impossible for the expert witness called by the interested parties, to reconstruct what was attorney time and what was fiduciary time.
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> i. The estate was not complicated enough to justify the fees sought by Mr. Mikesell.

j. Further, it is not the responsibility of the court to reconstruct an attorney's fees. The law requires Mr. Mikesell to justify his claim for fees, and the court finds that Mr. Mikesell has failed to sustain the burden of proof necessary to justify the requested fees.

Given the above findings of the probate court, we can conceive of no justification for awarding petitioner the full amount of his requested attorney fees. See *In re Kiebler Estate*, *supra*. We agree with appellees' observation that the probate court's attorney fee award is "clearly contrary to the court's specific findings" and provided petitioner a benefit to which he was not entitled to the detriment of the estate and its beneficiaries.

We therefore reverse the probate court's award of attorney fees to petitioner and remand this case to the probate court with instructions to determine the reasonable value of petitioner's services in light of the court's own findings.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White